JALLCON (M) SDN BHD

v.

NIKKEN METAL INDUSTRIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-690-98]
14 APRIL 2000

CIVIL PROCEDURE: *Preliminary objection - Notice to opponent - Whether short notice - Whether Senior Assistant Registrar was right in allowing PO*

The plaintiff raised a preliminary objection ('PO') before the SAR that the defendant's application for extension of time to file the notice of appeal in encls. 45 and 46 were only served on the plaintiff on 22 February 2000 even though they were filed on 24 December 1999. On the other hand, the defendant who had notice of the PO on 10 March 2000, complained of short notice. The SAR ruled that the plaintiff could proceed with the merits of the PO despite the short notice. The SAR then allowed the PO and at the same time dismissed the defendant's application in encl. 45. Hence, the defendant's appeal in encls. 49 and 51 against the SAR's decision for allowing the merits of the PO to be heard despite the short notice.

Held:

[1] The notice of appeal must be issued within five days after the judgment, order or decision appealed against was given or made. The purpose of the time limit was to enable the opposite party to know whether an appeal had been lodged. The failure to comply with this stringent requirement would debar the loser from appealing unless the court extends time on the basis of an affidavit evidence.

[2] The notice to raise the preliminary objection was handed to the defendant on 10 March 2000 and the hearing of encl. 45 before the SAR was fixed on 13 March 2000. The defendant had three days to prepare. Moreover, the PO was quite straightforward, *ie*, that encl. 45 together with the affidavit in encl. 46 were served on the plaintiff on 22 February 2000 even though they were filed on 24 December 1999. There were no legal technicalities involved in this kind of PO. It was a waste of judicial time to file the notices of appeals in encls. 49 and 51.

[3] Both encls. 49 and 51 were also not served promptly on the plaintiff. The time frame set by para (3) r. 1 of O. 56 RHC must be strictly and religiously adhered to by the defendant and that was not done at all.

[PO allowed with costs in favour of plaintiff. Enclosures 49 and 51 struck off without costs.]

Case(s) referred to:
Bank of New Zealand v. Cermac Modular Industries [1972] NZLR 661 ***(refd)***
Dato Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 ***(refd)***
DP Vijandran v. Karpal Singh [1992] 1 CLJ 119 ***(refd)***
Kenmoor International Ltd & Anor v. DB Trustee (M) Bhd & Anor [1997] 3 CLJ Supp 19 ***(refd)***
Ooi Chew Seng v. Ultratech Sdn Bhd & Ors [1997] 5 CLJ 421 ***(refd)***
Public Feedmill (M) Sdn Bhd (in liquidation) v. Hai Yeu Hin [1994] 2 MLJ 34 ***(refd)***
Sykt Pembenaan Raya Sdn Bhd v. Langkawi Marble Co Sdn Bhd & Ors [1998] 5 MLJ 202 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1, O. 56 r. 1(2), (3), O. 92 r. 4

For the plaintiff - Sharmini Thiruchelvam; M/s David Lingam & Co
For the defendant - CS Lam; M/s Syarikat Lek Yan

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Background Facts

On 8 December 1999, the senior assistant registrar ("SAR") in the person of Hajjah Wan Azizon bte Ahmad allowed the defendant's application in encl. 36 for summary judgment on the counter claim but, acting cautiously, she ordered a stay of execution until the disposal of the plaintiff's case. The plaintiff appealed by way of a notice of appeal to the judge in chambers against the decision of the SAR and this can be seen in encl. 43 which was filed on 10 December 1999. The defendant too was not happy with the decision of the SAR and it lodged a notice of appeal to the judge in chambers in encl. 44 on 21 December 1999. But encl. 44 was out of time and it ran counter to O. 56 r. 1, para. (3) of the Rules of the High Court 1980 ("RHC"). Paragraph (3) of that rule of that order reads as follows:

> (3) Unless the Court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.

Being out of time, the defendant acted prudently by filing an application for extension of time to file the notice of appeal by way of a summons in chambers in encl. 45 which was filed on 24 December 1999. Enclosure 45 was supported by an affidavit affirmed by Wong Swee Kong on 23 December 1999 and filed on the next day as seen in encl. 46.

In due course, encl. 45 was fixed for hearing before the SAR on 13 March 2000. On that hearing date, the plaintiff's solicitor raised a preliminary objection to the effect that encl. 45 together with the affidavit in support as reflected in encl. 46 were only served on the plaintiff's solicitor on 22 February 2000 even though they were filed on 24 December 1999. The plaintiff's solicitor had given notice of the preliminary objection to the defendant's solicitor on 10 March 2000. This was acknowledged by the defendant's solicitor but the complaint was that the notice of the preliminary objection was too short. The hardworking SAR heard the arguments from both sides and she ruled that the plaintiff's solicitor could proceed with the merits of the preliminary objection despite the short notice. Since the defendant's solicitor indicated to the SAR that the defendant would appeal against this ruling, the SAR then fixed the preliminary objection for mention before herself on 29 March 2000. But on 20 March 2000 the matter came up to me for mention and I ordered that the merits of the preliminary objection be heard by the SAR on 29 March 2000. I then ordered that the matter be fixed for mention before me on 7 April 2000. On 29 March 2000, the SAR heard the merits of the preliminary objection and she allowed the preliminary objection and at the same time dismissed the defendant's application in encl. 45. On 7 April 2000, I was on emergency leave and the deputy registrar adjourned the matter to 24 April 2000. As scheduled, on 24 April 2000, I heard the arguments in regard to the merits of the preliminary objection and I allowed it forthwith with costs in favour of the plaintiff. I too struck off encls. 49 and 51 without costs. The defendant has since lodged an appeal to the Court of Appeal against my decisions dated 24 April 2000.

Now encls. 49 and 51 were the notices of appeals to the judge in chambers filed by the defendant against the SAR's decision for allowing the merits of the preliminary objection to be heard despite the short notice.

To date, both encls. 43 and 44 have not been fixed for hearing.

The Decisions Dated 24 April 2000

Miss Sharmini Thiruchelvam, learned counsel for the plaintiff, with vigour and vitality argued that the sealed copies of both encls. 49 and 51 were not served promptly on the plaintiff's solicitors. According to her, the sealed copies of encl. 51 and 49 were served on the plaintiff's solicitors on 18 April 2000 and

19 April 2000 respectively. The returnable dates for both encls. 49 and 51 were 7 April 2000 as set by the SAR. For encls. 51 and 49, the delays were in the region of 11 days and 12 days respectively.

Nik Hashim JC (now judge) in *Ooi Chew Seng v. Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344, in a well considered judgment, had this to say of O. 56 r. 1, para. (3) of the RHC (see p. 350 of the report):

> The provisions of O. 56 r. 1(3) of the RHC are mandatory, and it is the duty of the party who wishes to appeal to comply with them strictly. In the case before me, the notice of appeal that was served within time was not valid for lack of legal authority, while the valid one was served outside the prescribed period. Accordingly, I rule that the appeal cannot be said to have been brought properly before the court, and as such, on the preliminary objection, the appeal to the judge in chambers is struck off with costs.

and his Lordship was also of the view that for the notice of appeal to be valid in law, it has to be issued within the meaning of O. 56 r. 1, para. (3) of the RHC. This was what his Lordship said at p. 349 to p. 350 of the case of *Ooi Chew Seng*:

> Before a notice of appeal can be said to be valid in law, it has to be issued. What does the word 'issued' mean under O. 56 r. 1 (3) of the RHC? Abdul Malik Ishak J in *Chern Yen Ming & Anor v. Teng Ik Ngee Construction Sdn Bhd & Ors* [1996] 4 MLJ 227 at p 231 said:
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> > ... Now, even though the words like 'signed, sealed and dated' do not appear in O. 56 r. 1(3) of the RHC, yet on perusal of Form 114, I venture to say that in construing the meaning of the word 'issued' the usual salutations of 'signed, sealed and dated' should be attached to it, after all the word 'seal' appears at the bottom portion of Form 114 just above the word 'registrar'.
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> He continued to say at the same page:
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> > ... to construe the meaning of the word 'issued' under O. 56 r. 1 (3) of the RHC, it would be when the notice of appeal to the judge in chambers is actually signed, sealed and dated and when such notice is signed, sealed and dated, then it is deemed to be issued and it is on that date that the court must construe that it was issued.
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> With respect, I am in agreement with the learned judge on the interpretation of the word 'issued' under O. 56 r. 1(3) of the RHC. In the instant case, the notice of appeal which was served on the respondents on 13 April 1996 was not sealed, dated and signed by the registrar. Neither was the date for the hearing of the appeal before the judge in chambers fixed in that notice. The notice was filed in court on 24 March 1996, and it was issued by the court dated also on 24 March 1996. But it is significant to note that it was not the

> notice which was issued and dated 24 March 1996 that was served on the respondents. What was served on 13 April 1996 was a 'blank' notice of appeal which was unsealed, undated and unsigned by the registrar. Until the notice is signed, sealed and dated by the registrar of the High Court as required in Form 114, the notice of appeal, in my view, cannot be said to be a valid notice of appeal clothed with the legal authority of being issued pursuant to O. 56 rr. 1 (2) and (3) of the RHC (see *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 MLJ 85). In my judgment, the notice of appeal that was served on 13 April 1996 is not a valid notice of appeal. It was not issued by the court. The notice was prematurely served. Service with an invalid notice of appeal cannot be considered a valid service.

Applying the case of *Ooi Chew Seng*, the delays in serving the sealed copies of encls. 51 and 49 must be construed as fatal because it ran counter to the provisions of O. 56 r. 1, para. (3) of the RHC.

It must be recalled that there were adjournments before encls. 49 and 51 were finally heard on 24 April 2000. Mr. CS Lam, learned counsel for the defendant, argued that those adjournments should be construed in favour of the defendant. It was argued that those adjournments had the effect of extending the date of service of the notices of appeals. I beg to disagree and I am supported by the decision of VC George J (as he then was) in the case of *Public Feedmill (M) Sdn Bhd (in liquidation) v. Hai Yeu Hin* [1994] 2 MLJ 34. In that case, his Lordship VC George J (as he then was), at p. 39 of the report, had this to say:

> The two adjournments of the date of hearing of the appeal has not the effect of nullifying the notice that had been issued on 13 April and per se does not have the effect of extending the date of service of the notice.

The case of *Kenmoor International Ltd & Anor v. DB Trustee (M) Bhd & Anor* [1997] 3 CLJ Supp 19; [1997] 5 MLJ 421 that was relied upon by the defendant was distinguishable on the facts. That was a case where the notice of appeal was filed, signed and sealed within the time prescribed but was extracted from the court registry after the expiry of the time limit. In the present appeal, it was not the fault of the court registry. The fault as explained in encl. 46 was entirely on the part of the defendant who was said not to be contactable as the defendant was busy securing sub-contract works overseas in view of the bad economy. For the moment, I have nothing to say in regard to encl. 46. That would involve an exercise in the near future.

Abdul Aziz J in *Sykt Pembenaan Raya Sdn Bhd v. Langkawi Marble Co Sdn Bhd & Ors* [1998] 5 MLJ 202 followed the decision of Nik Hashim JC (now judge) in *Ooi Chew Seng v. Ultratech Sdn Bhd & Ors (supra)* as to the meaning of the word "issued" that appeared in O. 56 r. 1, para. (3) of the RHC. At p. 206 of the report, his Lordship Abdul Aziz J said:

> Learned counsel for the plaintiff submitted that para (3) does not say that it is the sealed copy that must be served at least two clear days before the day fixed for hearing the appeal. There is no merit in that submission. That notice to be served is the notice that is 'issued' and, as was decided in *Ooi Chew Seng*, 'issued' in para (3) means issued by the court.

In a well written judgment, his Lordship Abdul Aziz J examined the ramifications of paras. (2) and (3) of r. 1 of O. 56 of the RHC. I have reproduced para. (3) of r. 1 of O. 56 of the RHC and I shall now reproduce para. (2) of r. 1 of O. 56 of the RHC. It is worded as follows:

> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.

and Abdul Aziz J in serious vein said (see p. 207 of the report):

> I nevertheless am unable to agree that failure to serve the notice not less than two clear days before the day fixed for hearing the appeal results in no appeal having been brought, as if the notice of appeal that has been issued in time does not exist, so that there is, in this case, no appeal, or rather notice of appeal, to be reinstated. With respect, I think too much significance ought not to be placed on the word 'brought' in para (2) so that the mind is led to question whether an appeal has or has not been brought should any of the requirements of the two paragraphs not be complied with. The word 'brought', I think, is employed in para (2) as an appropriate word, as a matter of style, to be employed for conveying the essential instruction that the paragraph seeks to convey, which is simply as to the steps one needs to take if one wishes to take a matter up on appeal. Paragraph (2) requires one to inform the other party of one's intention to appeal by serving on him the notice in Form 114.

In regard to para. (3) of r. 1 of O. 56 of the RHC, this was what Abdul Aziz J had to say (see the headnote at p. 203 of the report):

> Paragraph (3) of O. 56 r. 1 states that the notice must be issued within five days after the judgment, order or decision appealed against was given or made. The issued notice must be served on the respondent at least two days before the hearing date. The purpose of the five-day period is to ensure that the respondent is not subject to appeal indefinitely, and the purpose of the two day period is to ensure that the respondent would have time to prepare its case. While it may be just to bar the appellant from appealing if it missed the five-day period, it would be wrong to rule that the appeal was not brought and to strike off the appeal when the default pertained to the time of service. Such a consequence would bear no relationship with the purpose of the service time requirement. Instead, when there is non-compliance with the service time, the question which should arise is whether the court should fix or refuse to fix

another hearing date. Fairness to the respondent and the appellant's lack of diligence in serving the notice of appeal would be grounds for refusal. At least, another date should be given, in which case service of the notice must be effected at least two full days again before that date. If service cannot be effected before that date, the appellant must file an affidavit as to the reasons for the failure so that the court will have some material on which to consider whether to grant another date (see pp 207F-I and 208A-G).

In the context of the present appeal, I must make the following observations which would determine the matter once and for all:

That the notice of appeal must be issued within five days after the judgment, order or decision appealed against was given or made. The purpose of the time limit was to enable the opposite party to know whether an appeal had been lodged. The winner must know whether the loser was going to appeal and if the loser proposes to appeal, the notice of appeal must be issued within five days from the date of the judgment, order or decision appealed against. The failure to comply with this stringent requirement would debar the loser from appealing unless the court extends time on the basis of an affidavit evidence. In the context of the present appeal, the explanation to support the extension of time as seen in encl. 46, was due to the difficulty in contacting the defendant who was busy securing sub-contract works overseas. As I said, I have nothing to say in regard to encl. 46. Any comments would be reserved for the future. Be that as it may, the issue of the day was whether the notice to raise a preliminary objection by the plaintiff was too short. It must be recalled that the notice was handed to the defendant's solicitor on 10 March 2000 and the hearing of encl. 45 before the SAR was fixed on 13 March 2000. The defendant had at least three solid days to prepare. Moreover, the preliminary objection was quite straight forward: that encl. 45 together with the affidavit in encl. 46 were served on the plaintiff's solicitor on 22 February 2000 even though they were filed on 24 December 1999. There were no legal technicalities involved in this kind of preliminary objection. It was a waste of judicial time to file the notices of appeals in encls. 49 and 51. Furthermore, both encls. 49 and 51 were not served promptly on the plaintiff's solicitors. There was a blatant disregard to para. (3) of r. 1 of O. 56 of the RHC. This was my judgment and I so hold accordingly.

I am aware of the decision of Lim Beng Choon J in *DP Vijandran v. Karpal Singh* [1992] 1 CLJ 119 where his Lordship applied O. 92 r. 4 and O. 2 r. 1 of the RHC to cure the failure to file an affidavit of special circumstances in support of an oral application for stay pending appeal before the judge in chambers. That case was decided on 27 November 1991 and reported in 1992 and it was based on an entirely different set of facts. The law has since propelled ahead. The courts are no longer tolerant to breaches of the procedural

rules as set out in the RHC. I had occasion to consider the effect of non-compliance with the RHC in the case of *Dato Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 1 CLJ 625. At p. 631 of the report, this was what I said:

> In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multi Super Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure the RHC should be strictly followed to the letter.

At the risk of being trite, I would add that the courts will show a marked inclination to strictly and meticulously follow the RHC and give effect to it vigorously. The RHC is a code of procedure and it plays a paramount role in regulating the proceedings in the courts. The RHC must be expounded in accordance to its manifest and express intention. This approach has been described aptly by North P in the *Bank of New Zealand v. Cermac Modular Industries* [1972] NZLR 661, at p. 670 as "the paramount rule of construction." Thus, the time frame set by para. (3) of r. 1 of O. 56 of the RHC must be strictly and religiously adhered to by the defendant's solicitor and this was not done, at all. To reiterate, I allowed the preliminary objection with costs in favour of the plaintiff. Enclosures 49 and 51 were also struck off without costs.